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Supreme Court, U.S.
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No. 85-1132

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ROSENTHAL & ROSENTHAL, INC. and
BROADWAY 41ST STREET REALTY CORPORATION,

Petitioners,

-v-

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel
Attorney for Respondents,
The City of New York and Edward I. Koch
100 Church Street
New York, New York 10007
(212) 566-6640

JEFFREY E. GLEN,*
RON KAPLAN,
of Counsel.

(appearances cont'd)

*Counsel of Record

LEAHEY & JOHNSON, P.C.
Attorneys for Respondents,
New York State Urban Development
Corporation, Times Square
Redevelopment Corporation and
William J. Stern
120 Wall Street
New York, New York 10005
(212) 269-7308

ROBERT W. DAWE*
of Counsel.

SHEA & GOULD
Attorneys for Respondents,
Park Tower Realty Corp.
and George E. Klein
330 Madison Avenue
New York, New York 10017
(212) 370-8484

DEAN G. YUZEK*
of Counsel.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether this Court ought to review a challenge to the constitutionality of the condemnation of one particular parcel within the 42nd Street Development Project when Petitioners have not contested the public purpose of the Project and the condemning authority and every federal and state court that has addressed the issue of the Project's public purpose have found that the condemnation is rationally related to a public purpose.

STATEMENTS PURSUANT TO RULE 28.1

Rule 28.1 Statement for Respondent Park Tower Realty Corporation:

Emsworth Realty Corp;
Federal Tower Associates;
Federal Tower Construction Corporation;
499 Park Avenue Associates;
Fulton DeKalb Associates;
Madison Tower Associates;
Maiden Lane Associates, L.P.;
Park Avenue Tower Associates;
Park Avenue Tower Construction Corporation;
Park Avenue Tower Management Corporation;
Park Tower Associates;
Park Tower Consultants, Ltd.;
Park Tower Development Corporation;
Park Tower Federal Management Corporation;
Park Tower 55th Associates, L.P.;
Park Tower Leasing Corporation;
Park Tower Management, Ltd.;
Park Tower Properties, Ltd.;
Park Tower Security Corporation;
Park Tower Times Square Associates;
Park Tower Times Square, Ltd.;
Pearl-Tillary Company;
TDG Associates;
390 Tower Associates; and
Wall Street Tower Associates.

Rule 28.1 Statement for Respondent New York State Urban Development Corporation:

City-State Development Corporation;
New York Convention Center Development Corporation;
New York State Mortgage Loan Enforcement and Administration Corporation;
South Bronx Development Organization; and
Times Square Redevelopment Corporation.

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COUNTER-STATEMENT OF THE CASE

This brief is submitted on behalf of Respondents to urge denial of a petition for a writ of certiorari to the United States Court of Appeals

for the Second Circuit. The 42nd Street Development Project (the Project), a joint effort of the respondents New York State Urban Development Corporation (UDC) and the City of New York (City), was undertaken in an attempt to reverse the undisputed physical and economic decline of the West 42nd Street/Times Square section of New York City. (12a, 13a and 28a).* The Project consists of the planned renovation of nine theaters on 42nd Street, subway station improvements, a new hotel, a large wholesale merchandise mart, and four new office towers. One of the four towers will be built partially on the site now occupied by the Rosenthal Building. The land within the Project Area will be assembled by UDC through purchase or the use of the power of eminent domain. Construction of buildings will be undertaken by designated private developers. (13a and 29a).

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* Unless otherwise indicated, numbers in parenthesis followed by the letter "a" are references to the Appendix in the Petition.

The Project's goals and public purpose were set forth by the City and UDC in the Final Environmental Impact Statement:

> First, to eliminate the blight and physical decay, as well as the crime and frightening street life, that now characterizes the West 42nd Street area;
>
> Second, to preserve and restore the area's extraordinary older theaters for theatrical and upgraded movie use, and, by so doing, to revitalize the project area as a theater and entertainment center serving tourists and all New Yorkers;
>
> Third, to develop the project area's commercial and retail potential to produce a lively, healthy street ambience and to support the City's policy (as expressed in the new Midtown Zoning) that encourages the movement of Midtown office construction westward;
>
> Fourth, to help upgrade public facilities in the project area, particularly the Times Square subway station;
>
> Fifth, to increase the project area's economic contribution to the City as a whole, both through increased revenues to the City and expanded private investment and employment opportunities; and
>
> Sixth, to restore the project area's role as a positive influence on the adjacent communities, notably the theater

> district, the garment center, and the Clinton residential neighborhood, and as a productive link among these communities and the expanding midtown office district.

G & A Books, Inc. v. Stern, 770 F.2d 288, 292 (2d Cir.), aff'g 604 F. Supp. 898 (S.D.N.Y.), petition for cert. filed sub nom., M.J.M. Exhibitors, Inc. v. Stern, 54 U.S.L.W. 3437 (U.S. Dec. 13, 1985) (No. 85-1032). The District Court found that "[t]he complaint itself refers to the broad public purposes behind this Project; to eradicate blight in Times Square and to revitalize the area culturally and commercially .... In fact, plaintiffs [Petitioners here] do not even plead that the project lacks a public purpose." (19a) (emphasis in original). Their argument is thus limited to the propriety of the taking of their building for inclusion in a valid public project. In essence, they attack what the Circuit Court termed, "a classic example of a taking for a public purpose or use within the law of eminent domain." (5a).

Chief Judge Motley, dismissing the Petitioners' complaint for failure to state a cause of

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action upon which relief may be granted, held:

> The Forty Second Street Project has emerged from the political process as a comprehensive attempt to address the implacable problems of crime and decay in Times Square. It addresses legitimate public purposes in a reasonable way, and the inclusion of the Rosenthal building, less than a block from the core area of blight, is certainly not irrational. Absent a particularized pleading of public fraud, or evidence of some other specific constitutional violation, that is enough to pass the scrutiny of this court.

(22a). The Court of Appeals affirmed, stating, "No serious argument can be made that the Forty-Second Street Development Project does not address legitimate public purposes in a reasonable manner." (4a). Accordingly, the Circuit, relying upon this Court's decisions in Berman and Midkiff, rejected Petitioners' speculative argument that their building is being taken for improper purposes. (5a).

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS MATTER.

This case arises out of the proposed condemnation by the New York State Urban

Development Corporation of thirteen acres in the West 42nd Street/Times Square area of New York City, constituting the Forty-Second Street Development Project. As not contested by Petitioners, and as found by the Urban Development Corporation, the courts below, and every other state and federal judge who has dealt with the Project, the condemnation is a means to eliminate the blight, physical decay, and crime that characterize this area, through commercial development and restoration of an historic theater and entertainment center serving tourists and all New Yorkers.

The Project is typical of the large scale urban redevelopment that has been uniformly approved by federal courts since this Court's decision thirty-two years ago in Berman v. Parker, 348 U.S. 26 (1954). The legal principles governing the use of the sovereign power of eminent domain have been clearly enunciated in an unbroken line of authority of this Court stemming from its 1896 decision in United States v. Gettysburg Electric R. Co., 160

U.S. 668, and most recently reaffirmed in Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 104 S. Ct. 2321 (1984). The lower courts herein have been guided in their test of the Project by this Court's holding that "[a court] will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation,'" Midkiff, 104 S. Ct. at 2329 (quoting Gettsyburg Electric, 160 U.S. at 680).

The instant case is brought by the owners of a single property, within the Project boundaries, who seek to have their property exempted from the overall condemnation. (32a). They do not challenge the validity of the Project itself or its public purpose. Nor do they "seek to enjoin the Forty-Second Street Development Project in its entirety or any portion of that Project that does not involve the taking of the Rosenthal Building." (31a). This case amounts to nothing more than the routine application of a well-established legal standard to a

particular use of the power of eminent domain. As the petition presents no new issues of law or policy, and no occasion to review an innovative or unprecedented application of governmental power, it ought not to be granted by this Court.

The inappropriateness of this case for Supreme Court review is emphasized by the fact that the decisions below do not conflict with those of other Circuits. In fact, no Circuit Court since Midkiff has commented on or construed the scope of judicial review of a condemnor's declaration of public use or public purpose. In the single District Court opinion on this point since this Court last addressed it in 1984, the court applied the Midkiff formulation and reiterated the "palpably without reasonable foundation" language of Gettysburg Electric in upholding a condemnation determination. Pastan v. City of Melrose, 601 F. Supp. 201, 203 (D. Mass. 1985).

Further, it is significant that the finding of public use and public purpose has been upheld by

the Courts of the State of New York in seven decisions to date.* This Court has recognized that state court determinations are entitled to "great respect" on issues involving condemnations by state and local authorities in keeping with the tradition of avoiding federal involvement in local land use matters. Rindge Co. v. Los Angeles County, 262 U.S. 700, 705-706 (1923).

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* Matter of Clarose Cinema Corp. v. New York State Urban Development Corp., No. 24087 (N.Y. App. Div. 1st Dep't 1985), appeal dismissed, N.Y.L.J., Jan. 21, 1986, at 13, col. 7 (N.Y. Jan. 16, 1986) (renumbered 42 SSD 4); Matter of Jackson v. New York State Urban Development Corp., No. 24094 (N.Y. App. Div. 1st Dep't Oct. 22, 1985), appeal pending; Matter of Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., No. 24089 (N.Y. App. Div. 1st Dep't Oct. 22, 1985), appeal pending; Matter of Three-O Realty Co. v. New York State Urban Development Corp., No. 24090 (N.Y. App. Div. 1st Dep't Oct. 22, 1985); Matter of Times Square Garage Ltd. v. New York State Urban Development Corp., No. 24091 (N.Y. App. Div. 1st Dept. Oct. 22, 1985); Matter of TSNY Realty Corp. v. New York State Urban Development Corp., No. 24092 (N.Y. App. Div. 1st Dep't Oct. 22, 1985); Matter of Waybro Corp. v. New York State Urban Development Corp., No. 24093 (N.Y. App. Div. 1st Dep't 1985), appeal dismissed, N.Y.L.J., Jan. 21, 1986, at 13, col. 5 (N.Y. Jan. 16, 1986) (renumbered 43 SSD 5).

THE COURTS BELOW PROPERLY APPLIED THIS COURT'S DECISION IN HAWAII HOUSING AUTHORITY V. MIDKIFF IN REJECTING PETITIONERS' CHALLENGE TO THE CONDEMNATION OF A PARTICULAR PARCEL IN A LARGE URBAN DEVELOPMENT PROJECT.

The precise ground stated by Petitioners for their application to this Court is the alleged failure of the courts below to follow the holding in Midkiff. Petition for certiorari pp. 8-11. Petitioners claim that in this case, the lower courts purported to "foreclose all judicial review." Petition at p. 9. This is simply wrong; both the District and Circuit Courts engaged in a full review of Petitioners' claims. The District Court, after a lengthy analysis of these claims and of Midkiff, reviewed the proposed taking to assure that it "addresses legitimate public purposes in a reasonable way." (22a). The Circuit Court noted with approval the "hundreds of pages of detailed findings" adopted by UDC and its earlier findings in Natural Resources Defense Council, Inc. v. City of New York, 672 F.2d 292, 294 (2d Cir.), cert. dismissed, 456 U.S. 920

(1982). That Court held that "No serious argument can be made that the Forty-Second Street Development Project does not address legitimate public purposes in a rational manner." (4a). Thus, both courts applied the exact standard of review required by Midkiff.

This standard is not an abdication of judicial review. Respondents agree that "there is, of course, a role for courts to play in reviewing the legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." Midkiff, 104 S. Ct. at 2329. Thus, an order amounting to a taking of private property solely for the benefit of another private person even with compensation will be struck down where the order is not claimed to be for a public use. Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403, 416-417 (1896); see also Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937).

Petitioners, who, as the District Court pointed out, did "not even plead that the Project lacks a

public purpose," asserted that their property was improperly included within the Project.* (19a). They asked the courts below, and now ask this Court, to sort and choose among the various parcels selected for condemnation. That type of judicial review of a public taking was clearly held by this Court to be inappropriate in Berman v. Parker.

In Berman, this Court held that the scope of judicial review of a determination to exercise the eminent domain power to reach general land-use planning goals is "an extemely narrow one." "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 348 U.S. at 32. For as the Berman court held:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public

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* Petitioners' statement in their petition, at page 4, that their property is "several blocks away" from the blighted area is, at best, disingenuous. Their property is within the boundaries of the Project, "less than a block away from the core area of blight . . . ." (22a).

> purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch . . . . It is not for the courts . . . to sort and choose among the various parcels selected for condemnation. The rights of the property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

348 U.S. at 35 - 36.

This holding of Berman has been uniformly applied by over half of the Circuits in limiting judicial scrutiny over the scope or extent of a taking. United States v. 91.69 Acres of Land, 334 F. 2d 229, 232 (4th Cir. 1973); United States v. 101.88 Acres of Land, 616 F. 2d 762, 767 (5th Cir. 1980); Amen v. City of Dearborn, 718 F. 2d 789, 798 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States ex rel. T.V.A. v. Two Tracts of Land, 532 F. 2d 1083, 1084 (6th Cir.), cert. denied, 429 U.S. 827 (1976); United States v. 416.81 Acres of Land, 514 F. 2d 627, 631 (7th Cir. 1975); Lower Brule Sioux Tribe of South

Dakota v. United States, 712 F. 2d 349, 353 (8th Cir. 1983); United States v. 80.5 Acres of Land, 448 F. 2d 980, 983 (9th Cir. 1971); see also United States v. 82.46 Acres of Land, 691 F. 2d 474, 477 (10th Cir. 1982); L'Enfant Plaza v. District of Col. Redev. Land Agency, 564 F. 2d 515, 517 (D.C. Cir. 1977).

The instant case thus resolves itself into no more than a claim that Petitioners' particular property ought not to be included in a large redevelopment project with a manifest public purpose. Such a claim presents no new, controversial, or important issue to this Court, and the petition should be dismissed.

PETITIONERS' OTHER SUGGESTIONS OF LOWER COURT ERROR ARE WITHOUT MERIT AND DO NOT JUSTIFY THIS COURT'S REVIEW.

Petitioners suggest in their petition for certiorari that under this Court's opinion in United States v. Carmack, 329 U.S. 230 (1946), reh'g denied, 329 U.S. 834 (1947), each individual condemnation decision in the Project -- whether to take or not to take -- is subject to judicial review as

to its arbitrariness or capriciousness. Carmack itself did not utilize this standard of review, and it is clearly not applicable to particularized takings since Berman v. Parker. As demonstrated above, the finding of public use or purpose for the Project precludes further judicial review of the specific inclusion of Petitioners' property in the condemnation. The lower court cases cited by Petitioners either go to review of public use or purpose, which is conceded in the present case, see United States v. 101.88 Acres of Land, supra; United States v. 58.16 Acres of Land, 478 F.2d 1055, 1059 (7th Cir. 1973); United States v. 1,108 Acres of Land, 25 F.R.D. 205, 209 (E.D.N.Y. 1960), or to review a claim that the condemnor exceeded the powers delegated to it by the legislature, a claim not made in the present case, see United States v. 2.9 Acres of Land, 554 F. Supp. 529, 531 (D. Mont. 1982); Hilliard v. Commonwealth of Pennsylvania, 308 F. Supp. 756, 760 (W.D. Pa. 1970), aff'd, 438 F.2d 92 (3d Cir. 1971); United States v.

0.08 Acres of Land, 246 F. Supp. 408, 410 (E.D. Tenn. 1965); United States v. Certain Land in the Borough of Manhattan, 233 F. Supp. 899, 901 (S.D.N.Y.), aff'd, 336 F.2d 1021 (2d Cir. 1964).

Petitioners also suggest that the courts below erroneously failed to hold that the power of eminent domain cannot be used as a substitute for the power of taxation. This is simply not an issue in the present case, where the public purpose of the Project, "elimination of the physical, social and economic blight that has affected the Times Square area of Manhattan for the past fifty years," is incontestable and in fact uncontested. (3a). This case does not therefore present the question of whether a taking solely for the purpose of raising revenue is beyond the constitutional power of a condemning authority, a question raised and not decided in regard to condemnation of land for the World Trade Center in Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N.Y. 2d 379, 240 N.Y.S. 2d 1, app. dism'd, 375 U.S. 78, reh'g denied, 375 U.S. 960 (1963).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel
Attorney for Respondents,
The City of New York and Edward I. Koch
100 Church Street
New York, New York 10007
(212) 566-6640

JEFFREY E. GLEN*
RON KAPLAN
of Counsel.

LEAHEY & JOHNSON, P.C.
Attorneys for Respondents,
New York State Urban Development
Corporation, Times Square
Redevelopment Corporation and
William J. Stern
120 Wall Street
New York, New York 10005
(212) 269-7308

ROBERT W. DAWE*
of Counsel.

SHEA & GOULD
Attorneys for Respondents,
Park Tower Realty Corp.
and George E. Klein
330 Madison Avenue
New York, New York 10017
(212) 370-8484

DEAN G. YUZEK*
of Counsel.

*Counsel of Record